IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1275 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

VIRENDRA MAHASHETH - Petitioner(s)
Versus
STATE OF GUJARAT THRO' THE SECRETARY & 4 - Respondent(s)

==========

Appearance :
MR BI Mehta for Mr TRILOK J PATEL for Petitioner(s) : 1,
Ms. Sandhya Natani, AGP for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 2 - 5.

==========

CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 29/08/2007

ORAL JUDGMENT

1. Heard learned Advocate Mr. BI Mehta for Mr. Trilok J. Patel for the petitioner and Ms. Natani, learned AGP for the respondents.
2. Rule. Service of rule is waived by the learned AGP Ms. Sandhya Natani on behalf of the respondent State Authorities. In the facts and circumstances of the case, with consent of both the learned Advocates, the matter is taken up for final hearing today.
3. As per the case of the petitioner, the petitioner was appointed as Junior Engineer on 26.6.1973. In February, 1983, petitioner was promoted to the post of Deputy Executive Engineer. On 29.7.1987, services of the petitioner were terminated because of unauthorized absence. Said order was challenged by petitioner before this court by filing Special Civil Application no. 228 of 1988 wherein this Court (Coram : Hon'ble Mr. Justice P.B.Majmuda,J.) has by order dated 10.12.2003, set aside the termination order and granted reinstatement without back wages for interim

period and it was kept open for the respondents to hold appropriate inquiry in accordance with law. It was also observed that the petitioner will not be entitled to any monetary benefits, however, his services should be treated as continuous service for enabling the petitioner to get all any other benefits. On 1st October, 2004, one application being Miscellaneous Civil Application No. 1669 of 2004 for modification of earlier order was filed by the petitioner which was disposed of by this court and thereafter, representation was made by the petitioner on 6th August, 2005 wherein the respondents passed an order on 4th September, 2006 and considered interim period from 19th December, 1983 to 31st January, 2004 as unauthorized absence and break in service for the purpose of pension. Therefore, petitioner has challenged aforesaid order which is at page 36 dated 4th September, 2006.

4. In this matter, affidavit in reply has been filed by the respondent No. 3 denying the averments made by the petitioner in this

petition. According to the respondents, the petitioner is not entitled for the benefit of continuity of service of interim period and question of granting pension does not arise because interim period was treated as unauthorized service from duty. According to the respondents, as per the rules of the State of Gujarat Services Act, 2002, section 34(2), an employee is not entitled to get benefit of pension if he does not complete 10 years of service continuously. Thus, according to the respondents, action taken by the respondents is legal and valid and reply dated 4th September, 2006 is also legal and valid and same does not call for any interference of this court.

5. I have considered the pleadings of both the parties. I have also considered the submissions made by the learned advocates for the parties. The question to be examined by this court is, whether the petitioner is entitled for the benefit of continuity of service or not. For deciding that question, last paragraph of the decision of this Court (Coram : Hon'ble Mr.

Justice P.B. Majmudar,J.) in Special Civil Application NO. 228 of 1988 dated 10th December, 2003 is relevant. Same is, therefore, reproduced as under:

"Under the above circumstances, the impugned order is required to be set aside on the ground that the same is passed without hearing the petitioner. It will be open for the department to take appropriate action against the petitioner in accordance with law for the alleged act of remaining absent. The impugned order is set aside only the ground mentioned earlier. Since the petitioner had remained absent for a long period, in the facts of the case, he is not required to be given the benefit of any backwages for the entire intervening period. Since the petitioner was not heard by the department before passing the impugned order, this petition is allowed on this ground. The respondents are directed to reinstate the petitioner and thereafter, it will be open for the department to hold appropriate inquiry in accordance with law. If the department is of the view that the services of the petitioner are not required to be continued and his services are required to be terminated on any of the aforesaid grounds, it will be open for the department to take action in accordance with law. The respondents may reinstate the petitioner within a period of one month from today and the petitioner will not be entitled to any monetary benefit for the intervening period and only his service should be treated as continuous service, for enabling him to get all other

benefits."

5. Considering the last paragraph of the judgment of this Court in aforesaid Special Civil Application NO. 228 of 1988 dated 10.12.2003, it is clear that this court has, while allowing the petition partly to the extent indicated in the said order, made it clear that the respondents may reinstate the petitioner within one month from the date of the order and petitioner will not be entitled for any monetary benefits for the interim period and only his service should be treated as continuous for enabling him to get **all other benefits.** Said order of this court dated 10.12.2003 has not been challenged by the respondents before the higher forum and no stay is operating against the said order, but on the contrary, respondents have partly implemented the said order of this court as referred to above. Therefore, according to my opinion, considering the clarification made by this court in order dated 10.3.2003 that the petitioner is not entitled for any monetary benefits for

interim period but same period is to be treated as continuous service for enabling him to get all other benefits, decision of the respondents dated 4th September, 2006 which is at page 36 denying benefit of continuity of service for the period from 19th December, 1983 to 31st January, 2004 is required to be set aside.

6. Accordingly, said decision of the respondents dated 4th September, 2006 which is at page 36 is hereby set aside with a direction to the respondents to consider service of the petitioner as continuous service for the period from 19th December, 1983 to 31st January, 2004 for enabling the petitioner to get all other benefits. Accordingly, it is directed to the respondents to grant all benefits which are available to the petitioner on the basis of continuity of service as referred to above within the period of two months from the date of receipt of copy of this order.

7. Rule is made absolute in terms indicated herein

above with no order as to costs.

(H.K. Rathod,J.)

Vyas